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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LUCKY STORES, INC.,
Petitioner,

vs.

RICHARD HOLIHAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This supplemental brief is filed under Rule 15.7 of the Supreme Court Rules and calls attention to the Eighth Circuit's opinion in Webb v. Mercy Hospital, 1996 WL 714829 (8th Cir. 1996). This decision was issued on December 13, 1996. Petitioner's brief was filed on November 5, 1996. This supplemental brief is filed in furtherance of Petitioner's continuing duty to inform the Court of any developments which may conceivably affect the outcome of the Petition. See, Board of License Commissioners of Tiverton v. Pastore, 469 U.S. 238 (1995).

DISCUSSION

In Webb, plaintiff worked as a weekend nurse at a hospital. 1996 WL 714829 at 1. In December of 1992, Webb's schedule was changed so that she would not have to work the night shift. Id. The change was precipitated by a note from Webb's doctor stating that she should not work the night shift to avoid fatigue. Id. After several months, Webb was asked by her employer to again work the night shift. Id. Webb discussed her objections to Mercy's request with other employees and stated that she understood why someone, who had recently been in the news, had killed several people. Id. She also threatened co-workers with legal proceedings. Id. Webb was reprimanded for disruptive and insubordinate behavior and was told she **must** participate in employee assistance program counseling or she would be fired. Id. Webb was subsequently terminated for appearing at the hospital shortly after having been told not to come to the hospital

until further notice. Id. For two weeks following the termination of Webb, the hospital hired a private security guard for the hospital. Id.

Webb sued the hospital and her supervisors under the Americans With Disabilities Act ("ADA") on a perceived mental impairment theory. Id. Webb argued that she was regarded as suffering from a substantially limiting mental impairment because she had previously been diagnosed as depressed and because of the hospital's response to her recent behavior. Id. In upholding the district court's grant of summary judgment for the hospital, the Eighth Circuit stated that "a person is regarded as having an impairment that substantially limits major life activities when others treat that person as having a substantially limiting impairment." Id. at p. 2. The Court further noted that "an employer's knowledge that an employee exhibits symptoms which may be associated with an impairment does not necessarily show that the employer regarded the employee as disabled." Id. Moreover, in language that explicitly places the opinion at loggerheads with the Ninth Circuit's opinion in Holihan, the Court stated that "although Webb's supervisors testified she was a difficult and insubordinate employee, that does not establish that she was considered mentally impaired." Id. Thus, "without evidence that Mercy or [its] supervisors regarded her as mentally disabled or acted on such a perception, her ADA claim cannot go forward." Id. In Holihan, the Ninth Circuit by contrast, held that because Lucky Stores knew Holihan had "problems" and was stressed from work, it may have ipso facto regarded him as disabled.

The employer acknowledged in Webb that plaintiff was in need of counseling and indeed ordered her to participate in an EAP sponsored counseling program, quite similar to Lucky's suggestion that Holihan seek help through its EAP program. Yet the Eighth and Ninth Circuits reached irreconcilable results when presented with virtually identical circumstances. While the Ninth Circuit suggests that an EAP referral is sufficient to trigger "regarded as" liability under the ADA, the Eighth Circuit result indicates that not even an employer mandating that an employee seek EAP assistance triggers such liability.

CONCLUSION

For the above-stated reasons, it is requested that the Court consider Webb v. Mercy Hospital when deciding whether to grant Petitioner's Petition for Certiorari, and that such Petition be granted.

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